UNITED STATES DISTRICT COURT ISDC CLERK, CHARLESTAM, SC DISTRICT OF SOUTH CAROLINA

2007 OCT 29 A 9: 06

| Steven Gunter, #315394, | |) C/A No. 9:07-3503-TLW-GCK |
|-------------------------|-------------|-----------------------------|
| | Petitioner, |)) |
| vs. | |) Report and Recommendation |
| Jon Ozmint, | |) |
| | Respondent. |)) |

Background of this Case

The petitioner is an inmate at the Lieber Correctional Institution. On April 20, 2006, in the Court of General Sessions for Aiken County, the petitioner pled guilty to attempted second-degree criminal sexual conduct with a minor (2005-GS-02-1619) and criminal solicitation of a minor (2005-GS-02-767), and was sentenced to concurrent terms of fifteen and ten years. No direct appeal was filed. The petitioner filed an application for post-conviction relief (Case No. 06-CP-02-1527) on October 24, 2006. On August 6, 2007, the Court of Common Pleas for Aiken County, dismissed the application for post-conviction relief *with prejudice*. The petitioner, apparently, decided to withdraw the PCR application when he found out that the State would seek a more severe sentence on re-trial and would reinstate criminal charges dropped as part of the plea agreement.



The order of the Court of Common Pleas in the petitioner's post-conviction case appears in Docket Entry No. 1-2, at page 13. The order indicates that the Court of Common questioned the petition in open court and that the petitioner indicated: (1) he knew the court was willing to proceed with the PCR hearing; (2) he understood all of his conversations with his counsel; (3) he did not "desire any further time with counsel" and did not have any questions; (4) he "understood that a withdrawal with prejudice would bar him from ever challenging the convictions on any claim that he raised or could have raised at this time[;]" and (5) "having been advised that these potential allegations would be forever barred, the applicant still wished to withdraw his application." In the final paragraph of the "ORDER OF DISMISSAL WITH PREJUDICE," the Court of Common Pleas writes: "Accordingly, the court concludes that the applicant's decision to withdraw the application was knowingly, voluntarily, and intelligently made; therefore, the application is dismissed with prejudice." Neither the petitioner nor his counsel filed an appeal (petition for writ of certiorari) from the dismissal of the application for post-conviction relief.

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Discussion

Under established local procedure in this judicial district, a careful review has been made of the *pro se* petition pursuant to the procedural provisions of 28 U.S.C. § 1915 and the Anti-Terrorism and Effective Death Penalty Act of 1996. The review has been conducted in light of the following

¹Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (DSC), the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Maryland House of Correction, 64 F.3d 951 (4th Cir. 1995)(en banc), cert. denied, 516 U.S. 1177 (1996); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); Boyce v. Alizaduh, 595 F.2d 948 (4th Cir. 1979) (recognizing the district court's authority to conduct an initial screening of any pro se filing); Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978), cert. denied, Moffitt v. Loe, 446 U.S. 928 (1980); and Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir.), cert. denied, Leeke v. Gordon, 439 U.S. 970 (1978). The petitioner is a pro se litigant, and thus his pleadings are accorded liberal construction. See Erickson v. Pardus, 75 U.S.L.W. 3643, 167 L.Ed.2d 1081, 127 S.Ct. 2197 (U.S., June 4, 2007)(per curiam); Hughes v. Rowe, 449 U.S. 5, 9-10 & n. 7 (1980)(per curiam); and Cruz v. Beto, 405 U.S. 319 (1972). When a federal court is evaluating a pro se complaint or petition, the plaintiff's or petitioner's allegations are assumed to be true. Fine v. City of New York, 529 F.2d 70, 74 (2nd Cir. 1975). Even under this less stringent standard, the petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. Weller v. Department of Social Services, 901 F.2d 387 (4th Cir. 1990).

The one ground raised in the § 2254 petition in the case at bar concerns alleged coercion in the petitioner's post-conviction case: "Denied constitutional right to challenge conviction under the

²Boyce has been held by some authorities to have been abrogated in part, on other grounds, by Neitzke v. Williams, 490 U.S. 319 (1989)(insofar as Neitzke establishes that a complaint that fails to state a claim, under Federal Rule of Civil Procedure 12(b)(6), does not by definition merit sua sponte dismissal under 28 U.S.C. § 1915(e)(2)(B)(i) [formerly 28 U.S.C. § 1915(d)], as "frivolous").

Fifth Amendment (Due Process Clause), and the Fourteenth Amendment (Equal Protection Clause)[.]" In his "supporting facts" section, the petitioner writes:

The Applicant believes that the Constitution of the United States should protect his right to challenge his conviction in the state court without fear or threat of reprisal in the form of a more severe sentence or the reinstatement of criminal charges that were previously dismissed in a plea negotiated by counsel in the event that he were to prevail and have his conviction overturned.

(Petition [Entry No. 1], at page 5).

Constitutional errors in a state post-conviction case are not grounds for federal habeas corpus relief. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987); and *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988) (collecting cases holding that errors in a state post-conviction proceeding "cannot serve as a basis for federal habeas corpus relief"). These holdings have been codified at 28 U.S.C. § 2254(i).

If a South Carolina prisoner's application for post-conviction relief is denied or dismissed by a Court of Common Pleas, he or she can file an "appeal" (petition for writ of certiorari) in that post-conviction case. See § 17-27-100, South Carolina Code of Laws; and Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985).³ South Carolina prisoners have been successful on such appeals in their post-conviction cases. See, e.g., Staggs v. State, 372 S.C. 549, 643 S.E.2d 690 (2007) (post-conviction relief granted on grounds of trial counsel's actual conflict of interest from

³The Supreme Court of South Carolina has authorized the South Carolina Court of Appeals to hear petitions for certiorari in post-conviction cases upon referral from the Supreme Court of South Carolina. See Supreme Court Order 2005-08 (C.O. 08 effective May 1, 2005), Shearouse Advance Sheet # 19; and Dunlap v. State, 371 S.C. 585, 641 S.E.2d 431 (2007) ("In appeals from criminal convictions or post-conviction relief matters, a litigant is not required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error.")(emphasis in original).

representing members of same family; new trial ordered); *Custodio v. State*, 373 S.C. 4, 644 S.E.2d 36 (2007) (post-conviction relief granted on issue of enforcement of plea agreement); *Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006) (on issue of ineffective assistance of counsel); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Stevens v. State*, 365 S.C. 309, 617 S.E.2d 366 (2005); and *Vaughn v. State*, 362 S.C. 163, 607 S.E.2d 72, 73-76 (2004). Since the petitioner did not seek appellate review by the Supreme Court of South Carolina of the order entered on August 6, 2007, by the Court of Common Pleas, federal collateral review of the grounds raised in the petitioner's application for post-conviction relief is barred by a procedural default. *See Whitley v. Bair*, 802 F.2d 1487, 1500 & n. 27 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Mason v. Procunier*, 748 F.2d 852, 853-54 (4th Cir. 1984), *cert. denied*, *Mason v. Sielaff*, 471 U.S. 1009 (1985); and *Strader v. Allsbrook*, 656 F.2d 67, 68 (4th Cir. 1981).



Recommendation

Accordingly, it is recommended that the § 2254 petition be dismissed without prejudice and without requiring the respondent to file a return. See Allen v. Perini, 424 F.2d 134, 141 (6th Cir.) (federal district courts have duty to screen habeas corpus petitions and eliminate burden placed on respondents caused by ordering an unnecessary answer or return), cert. denied, 400 U.S. 906 (1970); Toney v. Gammon, 79 F.3d 693, 697 (8th Cir. 1996) ("However, a petition may be summarily dismissed if the record clearly indicates that the petitioner's claims are either barred from review or without merit."); Baker v. Marshall, 1995 U.S.Dist. LEXIS® 4614, *2-*3, 1995 WESTLAW®

150451 (N.D. Cal., March 31, 1995) ("The District Court may enter an order for the summary dismissal of a habeas petition if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in this Court."); and the Anti-Terrorism and Effective Death Penalty Act of 1996. The petitioner's attention is directed to the important notice on the next page.

October 29, 2007 Charleston, South Carolina George C. Kosko

United States Magistrate Judge

Notice of Right to File Objections to Report and Recommendation

The petitioner is advised that he may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court judge need not conduct a *de novo* review, but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in the waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); United States v. Schronce, 727 F.2d 91 (4th Cir.), cert. denied, Schronce v. United States, 467 U.S. 1208 (1984); and Wright v. Collins, 766 F.2d 841 (4th Cir. 1985).